

1 James D. Greene, Esq.
 2 Nevada Bar No. 2647
 3 BROWNSTEIN HYATT FARBER SCHRECK, LLP
 4 100 City Parkway, Suite 1600
 5 Las Vegas, NV 89106-4614
 6 Ph: (702) 382-2101
 7 Fax: (702) 382-8135
 8 E-mail: jgreen@bhfs.com

Filed May 8, 2008

5 Attorney for Platinum Properties 1, Inc.

6 **UNITED STATES BANKRUPTCY COURT**

7 **DISTRICT OF NEVADA**

8 In re
 9 USA COMMERCIAL MORTGAGE COMPANY,
 10 Debtor.

Case No. BK-S-06-10725-LBR
 Case No. BK-S-06-10726 LBR
 Case No. BK-S-06-10727 LBR
 Case No. BK-S-06-10728 LBR
 Case No. BK-S-06-10729 LBR

11 In re
 12 USA CAPITAL REALTY ADVISORS, LLC,
 13 Debtor.

Chapter 11
 Jointly Administered Under
 Case No. BK-S-06-10725 LBR

14 In re
 15 USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC,
 16 Debtor.

**MOTION FOR ORDER IN SUPPORT OF
 PLAN CONFIRMATION ORDER**

17 In re
 18 USA CAPITAL FIRST TRUST DEED FUND, LLC,
 19 Debtor.

DATE: JUNE 9, 2008
 TIME: 9:30 A.M.

20 In re
 21 USA SECURITIES, LLC,
 22 Debtor.

Affects:
 All Debtors
 USA Commercial Mortgage Company
 USA Securities, LLC
 USA Capital Realty Advisors, LLC
 USA Capital Diversified Trust Deed Fund, LLC
 USA Capital First Trust Deed Fund, LLC

23
 24 Platinum Properties 1, Inc. (Platinum"), by and through its counsel, Brownstein Hyatt
 25 Farber Schreck, LLP, hereby moves the Court for Entry of Order in Support of Confirmed Plan
 26 ("Motion"). This Motion is made and based upon the attached points and authorities, the
 27
 28

1 pleadings and papers on file herein and upon such argument as the Court may entertain at the
2 hearing on the Motion.

3 **POINTS AND AUTHORITIES**

4 *I. Factual Background*

5 **A. USACM and Related Bankruptcy Cases**

6 USA Commercial Mortgage Company ("USACM"), USA Securities, LLC, USA Capital
7 Realty Advisors, LLC, USA Capital Diversified Trust Deed Fund, LLC and USA Capital First
8 Trust Deed Fund, LLC ("FTDF"), and collectively the "Debtors"), filed voluntary petitions for
9 relief under chapter 11 of the Bankruptcy Code on April 13, 2006 in the United States
10 Bankruptcy Court for the District of Nevada ("Nevada Bankruptcy Court"), thereby commencing
11 the above-captioned bankruptcy cases. *See In re USA Commercial Mortgage Company,*
12 Bankruptcy Case No. BK-S-06-10725-LBR, Docket no. 1. By Order entered on May 9, 2006,
13 the Court approved the joint administration of the Debtors' bankruptcy cases. *See* Docket No.
14 184.

15 On January 8, 2007, the Court entered the [Proposed] Order Confirming The "Debtors'"
16 Third Amended Joint Plan of Reorganization," As Modified Herein ("Confirmation Order"),
17 thereby confirming the Debtors' third amended joint plan of reorganization, as modified by the
18 Confirmation Order ("Plan"). The Confirmation Order also approved certain documents filed in
19 conjunction with the Plan and transactions contemplated therein. *See* Docket No. 2376. The
20 Confirmation Order approved, *inter alia*, the Asset Purchase Agreement, dated December 8,
21 2006 ("APA") by and between USA Commercial Mortgage Company and USA Capital First
22 Trust Deed Fund, LLC, as "Sellers," and USA Capital Diversified Trust Deed Fund, LLC, USA
23 Capital Realty Advisors, LLC and USA Securities, LLC as "Acknowledging Parties," and
24 Compass Partners, LLC ("Compass") as "Purchaser." *See* Notice of Filing of Asset Purchase
25 Agreement Dated December 8, 2006, Docket No. 2164.

26 The Plan and the APA set forth the terms and conditions of the Asset Sale Transaction, as
27 defined in the Plan, pursuant to which Compass (or its designee) would acquire certain assets of
28 the Debtors, as defined in the APA. The Asset Sale Transaction to Compass closed on February

16, 2007 ("Closing"). As set forth in paragraph 14 of the Confirmation Order, the Assets (as defined in the APA) were conveyed to Compass free and clear of all liens, claims, interests, obligations and encumbrances, except as expressly permitted or otherwise specifically provided for in the APA or the Confirmation Order. *See Confirmation Order, Docket No. 2376, pages 5-6 of 29 (copy attached hereto as Exhibit 1).*

The APA defined the term "Assets" to include FTDF Assets listed on Schedule 1 to the APA and USACM's interests in Servicing Agreements and Personal Property as set forth in Schedule 2 to the APA. *See Docket 2164-2, page 5 of 24 (copy attached hereto as Exhibit 2).*

Schedule 2 to the APA includes an Asset described as follows:

<u>Loan Name</u>	<u>Origination Date</u>	<u>7/31/06 Loan Outstanding</u>	<u>FTDF Ownership</u>	<u>USMC Ownership</u>
HFA-Windham	11/15/2004	5,550,000	0.00%	0.00%

See Docket No. 2164-3, page 14 of 28 (copy attached hereto as Exhibit 3). Schedule 1 to the APA contains no reference to any loan identified as "HFA-Windham. *See Docket No. 2164-3, pages 10 through 12 of 28 (copy attached hereto as Exhibit 4).*¹

In accordance with the Confirmation Order, and upon the Closing of the Asset Sale Transaction, the Debtors conveyed to Compass all right, title and claims with respect to the transfers made by USACM to HFAH Asylum, LLC and/or Homes for America Holdings, Inc., and referenced as the "HFA-Windham" loan in Schedule 2 to the APA ("HFA-Windham Loan"). This transfer included, without limitation, the right to collect and receive repayment (i.e. to service that loan). *See Confirmation Order, Exhibit 1; Plan, Docket No. 1799, page 51 of 92 (copy attached hereto as Exhibit 5).*

Every party-in-interest, including, without limitation, the Debtors, the Debtors' successors in interest, and the Direct Lenders with respect to the HFA-Windham Loan, including the HFA-Windham Lenders listed in **Exhibit B** attached to **Exhibit 7** hereto, are barred from challenging the right of Compass, or its assignee, to collect and receive repayment of the HFA-Windham

¹ Schedule 2 attached to the Plan references the HFA-Windham Loan as "HFA-Windham (HFAH Asylum, LLC)." *See Docket No. 1799-3, page 4 of 18.* Schedule 3.3 attached to the Plan (concerning threatened litigation) references the HFA-Windham Loan and indicates the "borrowers" are "Homes For America Holdings, and affiliates, Homes for America Asylum, LLC." *See Docket No. 1799-3, pages 9 and 10 of 18 (copies of the documents referenced in this footnote are attached hereto as Exhibit 6).*

1 Loan, including the assertion of any "Surviving Section 3 Right", as that term is defined in
 2 Paragraph 14 of the Confirmation Order. *See Confirmation Order, Docket No. 2376, pages 5*
 3 and 6 of 29 (copy attached hereto as **Exhibit 1**).

4 **B. *The HFA Windham Transactions and Litigation***

5 **1. *The Enterprise Mortgage***

6 In 1994, the Town of Windham, Connecticut transferred certain parcels of real property
 7 located in that town at 322 Main Street and 118 Windham Road ("Windham Property") to
 8 Windham Mills Development Corporation ("Windham Mills"). On or about August 30, 1999,
 9 Windham Mills executed a Promissory Note in the principal amount of \$4,800,000 ("Enterprise
 10 Note") in favor of Enterprise Capital, Inc., n/k/a Independence Bank ("Independence Bank").
 11 The Enterprise Note was secured by an Open End Mortgage Deed, recorded in the Windham
 12 Land Records, pursuant to which Windham Mills granted a security interest in the Windham
 13 Property to Independence Bank ("Windham Mortgage"). The Enterprise Note was also recorded
 14 in the Windham Land Records as an exhibit to the Enterprise Mortgage. *See Exhibits E and F*
 15 to **Exhibit 7**.

16 Independence Bank subsequently commenced litigation in the Superior Court, Judicial
 17 District of New London, Connecticut entitled *Independence Bank, f/k/a Enterprise Capital, Inc.*
 18 v. *Windham Mills Development Corporation, et al.*, Case No. CV03-0071580 S, in which the
 19 Bank sought a judgment of strict foreclosure and sale with respect to the Windham Property
 20 ("Foreclosure Action"). Pursuant to an order dated June 28, 2004 ("Foreclosure Judgment"), the
 21 Superior Court, Judicial District of Windham at Putnam, entered a Judgment of Foreclosure by
 22 Sale in favor of Independence Bank and against Windham Mills and other defendants.

23 **2. *Homes for America Holdings and the Collateral Assignment***

24 In 2004, Homes For America Holdings, Inc. ("HFA Holdings") expressed an interest in
 25 purchasing the Windham Property from Windham Mills.² To facilitate the acquisition of the
 26 Windham Property by HFA Holdings, USACM and/or USA Capital Diversified Trust Deed

27 ² Certain of the assertions contained in this portion of the instant motion are derived from the "Platinum Complaint"
 28 referenced below. The Platinum Complaint (which is verified as true and correct pursuant to 28 U.S.C. § 1746) and
 certain of its Exhibits are attached hereto as **Exhibit 7**.

1 Fund, LLC agreed to find lenders willing to invest funds to make a loan (or loans) to HFA
2 Holdings. Thereafter, USACM sent offering circulars and inquiries to potential individual
3 lenders who would, collectively, lend the necessary funds to HFA Holdings to purchase the
4 Windham Property. According to the offering circular used by USACM to solicit investments in
5 this project, the loan proceeds were to be used to acquire and make improvements on the
6 Windham Property and investors were to have a first trust deed on the Property. By November
7 2004, USACM had succeeded in raising over \$5,000,000 from direct lenders, which funds were
8 used to make a loan totaling \$5,550,000 related to this transaction. There were a total of 74
9 direct investors in this loan ("HFA-Windham Lenders"), who are listed on **Exhibit B to Exhibit**
10 **7. See Exhibit 7, ¶¶ 7-15; Exhibit G to Exhibit 7** (Declaration(sworn under penalty of perjury)
11 of Karim Chowdhury, CFO for HFA Holdings), ¶¶ 11-12.

12 On or about November 10, 2004, Independence Bank assigned all of its rights under and
13 interest in the Enterprise Note and the Enterprise Mortgage to HFAH Asylum, Inc. ("Asylum").
14 This assignment was accomplished pursuant to a Note Allonge, dated November 10, 2004, an
15 Assignment of Open-End Mortgage Deed, a Collateral Assignment of Leases and Rents
16 ("Assignment of Mortgage"), and an Assignment of Promissory Note and Mortgage Deed and
17 Loan Documents from Independence Bank in favor of Asylum. *See Exhibit 7, ¶¶ 16-18;*
18 **Exhibit G to Exhibit 7, ¶¶ 11-12.**

19 On November 16, 2004, USACM wired an initial advance of \$5,050,000 of funds raised
20 from the HFA-Windham Lenders to HFA Asylum, a wholly-owned subsidiary of HFA Holdings.
21 On January 3, 2006, another advance of HFA-Windham Lenders' money, totaling \$500,000 was
22 made by USACM to HFA Asylum. On or about November 16, 2004, HFA Asylum, with the
23 knowledge and consent of HFA Holdings, executed a document entitled "Collateral Assignment
24 (Security Agreement)" which provided the HFA-Windham Lenders with a security interest in the
25 Enterprise Note and the Enterprise Mortgage, together with all right, title and interest of HFA
26 Asylum therein, as well as all right, title and interest of HFA Asylum in all substitute collateral
27 and proceeds along with all other documents that Windham Mills gave to the Independence Bank
28

BROWNSTEIN HYATT FARBER SCHRECK
100 City Parkway, Suite 1600
Las Vegas, Nevada 89106
(702) 382-2101

1 in connection with the Enterprise Note and the Enterprise Mortgage ("Collateral Assignment").
2 See **Exhibit 7**, ¶¶ 15-17.

3 Because the Enterprise Note and the Enterprise Mortgage were the subject of a pending
4 foreclosure action at the time they were assigned to HFA Asylum, the Collateral assignment
5 specifically granted the HFA-Windham Lenders the ability to prosecute the foreclosure action
6 against Windham Mills in the event of a default by HFA Asylum on the loan. Because HFA
7 Holdings and HFA Asylum had changed the terms of the loan originally provided by the HFA
8 Lenders, the Collateral Assignment also required HFA Asylum to execute loan documents to
9 substantiate the loan between HFA Asylum and the HFA-Windham Lenders, and it required
10 HFA Holdings to execute and deliver a guarantee of the loan for the benefit of the HFA-
11 Windham Lenders. See **Exhibit 7**, ¶¶ 22-23; **Exhibit C** to **Exhibit 7**. HFA Holdings and HFA
12 Asylum have, to date, failed to comply with these requirements. See **Exhibit 7**, ¶ 26.

13 Pursuant to the terms of the Collateral Assignment, USACM took possession of the
14 Enterprise Note and the Enterprise Mortgage to perfect the HFA-Windham Lenders' security
15 interest in those instruments. USACM, however, lost the original Note and Mortgage. See
16 **Exhibit 7**, ¶¶ 24-25; **Exhibit D** to **Exhibit 7**.

17 **3. Windham Mills Bankruptcy**

18 On December 15, 2004, just prior to the scheduled sale pursuant to the Foreclosure
19 Judgment, Windham Mills filed a voluntary bankruptcy petition ("Windham Bankruptcy Case")
20 under Chapter 11 of Title 11 of the United States Code ("Bankruptcy Code"), in the United
21 States Bankruptcy Court for the District of Connecticut (Hartford Division) ("Connecticut
22 Bankruptcy Court"), thereby commencing a case entitled *In re Windham Mills Development*
23 Corp., Bankruptcy Case Number 04-23619 (RLK). See Docket Sheet (relevant portions),
24 attached as **Exhibit 8** hereto. HFA Asylum timely filed a proof of claim in the Windham
25 Bankruptcy Case with respect to its claims under the Enterprise Note and the Enterprise
26 Mortgage, asserting a claim in the amount of (\$5,255,332.80), plus accruing interest, fees and
27 costs. See **Exhibit 9** hereto. Pursuant to an order entered on July 3, 2007, the Connecticut
28

1 Bankruptcy Court appointed Louis Testa, Esq. ("Chapter 11 Trustee") as the Chapter 11 Trustee
2 in the Windham Bankruptcy Case. *See Exhibit 8*, Docket Entry No. 391.

3 **4. *The HFA Recovery Lawsuit***

4 On June 7, 2007, an entity known as HFA Windham recovery, LLC ("HFA Recovery"),
5 which asserted that it was comprised of or represented approximately 80% of the HFA Lenders,
6 filed suit in the Supreme Court of the State of New York, County of New York, Case No.
7 601917/2007 ("New York Lawsuit"). In its complaint, HFA Recovery asserted claims against
8 defendants HFA Asylum, HFA Holdings, Compass Financial Partners, LLC, Compass USA SPE
9 LLC and Compass Partners LLC. On March 25, 2008, HFA Recovery filed a "Plaintiff's Notice
10 of motion to Discontinue Claims Against Defendants" ("Discontinuance Motion"). The
11 Discontinuance Motion remains pending. *See Exhibit H to Exhibit 7*, ¶¶ F through I.

12 **5. *The Platinum Adversary Proceeding***

13 As noted above, Compass purchased certain assets from the USACM bankruptcy estates,
14 including USACM's loan servicing rights related to the HFA-Windham Loan. On December 13,
15 2007, Compass executed an Assignment and Assumption of Loan Servicing Agreements,
16 pursuant to which Compass transferred to Platinum ("Platinum Assignment") all of its right, title
17 and interest in certain loan servicing agreements, including the HFA-Windham Loan. *See*
18 **Exhibit H to Exhibit 7**. In connection with the Platinum Assignment, HFA Recovery agreed
19 to dismiss the New York Lawsuit. As a result of the Platinum Assignment, Platinum is the
20 current, authorized loan servicer in connection with the HFA Windham Loan. The HFA-
21 Windham Lenders have authorized Platinum to act on their behalf with respect to the HFA-
22 Windham Loan and their rights pursuant to the Collateral Assignment.

23 On or about February 26, 2008, Platinum commenced an adversary proceeding in the
24 Windham Bankruptcy Case, Adversary Proceeding Number 08-02015 ("Platinum Adversary
25 Proceeding"), naming the Chapter 11 Trustee, Louis Testa, Esq., and HFA Asylum as
26 defendants. *See Exhibit 7*. The complaint in the Platinum Adversary Proceeding alleges that the
27 Trustee has been attempting to sell the Windham Property and that, because the debt
28 encumbering the property exceeds its value, he needs the secured creditor's consent to

consummate a sale. The complaint further alleges that, even though the HFA-Windham Lenders are the real parties in interest with respect to the HFA-Windham Mortgage, the Trustee is nevertheless dealing exclusively with HFA-Windham Asylum. The complaint seeks (a) declaratory relief regarding the validity of the HFA Lenders' claims relating to the Windham Property and their standing in that capacity; (b) a permanent injunction barring the Trustee from negotiating with the Trustee regarding the Windham Property; (c) imposition of a constructive trust on the Windham Property; (d) foreclosure of the HFA-Windham Lenders' security interests in the Enterprise Note and the Enterprise Mortgage; and (e) relief from the automatic stay.

The parties to the Platinum Adversary Proceeding have now entered into a settlement of that Proceeding. Pursuant to the settlement, HFA Asylum will assign to Platinum all of its right, title and interest in the Enterprise Note, the Enterprise Mortgage, and any other collateral securing the Enterprise Note. A condition to the proposed settlement, however, is that Platinum use its best efforts to obtain an order of the Nevada Bankruptcy Court making clear that Compass, as Platinum's predecessor in interest, had the sole right to service and collect the HFA-Windham Loan after the closing of the Asset Sale Transaction. Paragraph Two of the proposed settlement agreement states:

2. USA Capital Order. Within forty-five (45) days of the Effective Date of this Agreement, Platinum shall cause to be entered an Order (the "USA Capital Order") by the Nevada Bankruptcy Court in the USA Capital Bankruptcy Cases providing that pursuant to the USA Capital Confirmed Plan, Compass Partners, or its assignee(s) was the transferee of the right to receive re-payment of the funds transferred from USA Capital to HFAH or Asylum on November 16, 2004 (\$5,050,000.00) and January 3, 2005 (\$5,00,000.00). The USA Capital Order shall conform substantially to the form of proposed order attached hereto in Exhibit F. [The form of proposed order is attached to the instant Motion as **Exhibit 10.**]

II. Legal Argument

Platinum seeks relief in this instant Motion pursuant to Bankruptcy Code sections 105(a) and 1142(b), Article VIII(D) of the Plan and the Confirmation Order. Section 105(a) provides, in relevant part: "The court may issue any order, process, or judgment that is necessary to carry out the provisions of this title." 11 U.S.C. §105(a). Section 1142(b) provides:

1 The court may direct the debtor and any other necessary party to
2 execute or deliver or to join in the execution or delivery of any
3 instrument required to effect a transfer of property dealt with by a
4 confirmed plan, and to perform any other act, including the
satisfaction of any lien, that is necessary for the consummation of
the plan.

5 11 U.S.C. §1142(b). Read together, these provisions grant to court substantial latitude to issue
6 orders in aid of consummation and implementation of a confirmed chapter 11 plan.

7 Various provisions of the Plan and the Confirmation Order also establish that the Court
8 has the power to grant the relief sought herein. Section 10 of Article VIII(D) of the Plan
9 provides that the Court retained jurisdiction to resolve issues and enter orders "as may be
10 necessary or appropriate to execute, implement, or consummate the provisions of the Plan"
11 Section 11 of Article VIII(D) proves that the Court retained jurisdiction to hear and determine
12 disputes "arising under agreements, documents or instruments executed in connection with the
13 Plan . . ." Section 6 of the same Article of the Plan provides that the Court retained jurisdiction
14 to hear and determine "all matters related to the transfer of the Acquired Assets." And, pursuant
15 to section 9 of Article VIII(D) of the Plan, the Court retained jurisdiction to hear and determine
16 any and all contest or litigated matters "arising out of, arising under or related to the Chapter 11
17 Cases . . ." *See* Third Amended Joint Chapter 11 Plan of Reorganization, Docket No. 1799,
18 pages 82 and 83 of 92 (copy attached hereto as **Exhibit 11**).

19 Paragraph 14 of the Confirmation Order governs the terms of Compass's acquisition of
20 the Debtor's loan servicing agreements and provides that such acquisition is free and clear of all
21 liens, claims and interests, subject to the potential exercise of "Surviving Article 3 Rights."
22 Paragraph 14 also contains restrictions on the ability of subsequent loan servicers to affect the
23 rights of Compass to default interest, late charges and similar fees. and provides that the Court
24 retained jurisdiction to determine issues relating to the exercise of Surviving Section 3 Rights.
25 *See* Confirmation Order, Docket No. 2376, pages 5 and 6 of 29 (*see Exhibit 1*).

26 Here, the relief sought falls within the parameters of the foregoing provisions. Upon the
27 closing of Compass's purchase of the Acquired Assets, Compass (or its designee) was the owner
28 of all of USACM's rights under loan servicing agreements for the loans listed on APA Schedule

2, including the loan servicing rights relating to the HFA-Windham Loan. Compass subsequently assigned those rights to Platinum. Platinum undertook to enforce the rights of the HFA-Windham Direct Lenders by filing the Platinum Adversary Proceeding seeking relief from the Connecticut Bankruptcy Court enforcing the rights of the HFA-Windham Lenders in the Windham Property. The result of Platinum's efforts is a settlement pursuant to which the HFA-Windham Lenders' rights are completely vindicated. The only contingency is that Platinum is required to seek an order of this Court that (a) Compass (or its assignee) was, in fact, the servicer of the HFA-Windham Loan after the closing of the Asset Sale Transaction and, thus, had the right to collect the funds due in connection with that loan; and (b) that pursuant to the terms of the Plan and the Confirmation Order, other parties in interest are barred from challenging Compass's (and, thus, Platinum's) standing as the servicer of the HFA-Windham Loan.

The order sought herein is within the scope of Bankruptcy Code sections 105(a) and 1142(b) in that it is an order that is necessary to carry out the provisions of Title 11 and that is necessary to consummate the Plan. The Plan provisions governing retention of jurisdiction also make clear that the Court can and should issue the order sought here, which is necessary or appropriate to implement the Plan and which arises under agreements executed in connection with the Plan. The order sought here also relates to the transfer of the Acquired Assets as it deals directly with the rights to service the HFA-Windham Loan purchased by Compass pursuant to the Plan. Accordingly, Platinum moves the Court to enter an order as described above and in substantially the form attached hereto as **Exhibit 10**.

DATED this 8th day of May 2008.

BROWNSTEIN HYATT FARBER SCHRECK, P.C.

By: /s/ James D. Greene

James D. Greene, Esq.

100 City Parkway, Suite 1600
Las Vegas, Nevada 89106-4614

Attorneys for Platinum Properties 1, Inc.